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No. 87 - 779

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

RAYMOND DOBARD,

Appellant,

vs.

CITY OF OAKLAND,

Appellee,

On Appeal From the Circuit Court of Appeal for the Ninth Circuit

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MOTION TO AFFIRM DECISION BELOW-INSUBSTANTIALITY

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MOTION TO AFFIRM DECISION BELOW-INSUBSTANTIALITY

Appellee, pursuant to Rule 16.1(d) of the Rules of the Supreme Court of the United States, moves that the final judgment and order of the Circuit Court of Appeals for the Ninth Circuit be affirmed on the ground that the decision of the Circuit Court is so obviously correct under the principles established by this Court in Goldblatt v. Town of Hempstead, 369 U.S. 590, (1962), as to warrant no further

review by this Court.

OPINION BELOW

This is an appeal from a decision of the Circuit Court of Appeals for the Ninth Circuit, rejecting Appellant's contention that the demolition of his two substandard structures denied him due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and that the District Court judge was required to recuse himself from deciding the case.

JURISDICTION

Appellant cites 28 U.S.C. section 1254(2) as authority for this appeal, but misquotes the language of that provision. His Jurisdictional Statement states that an appeal may be taken under section 1254(2) "by a party relying on a State statute repugnant to the Constitution, or law of the United States." Section 1254(2) actually states that an appeal may be taken by a party "relying on a State statute held

by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States...." Appellant does not refer to any state statute which was held invalid on federal grounds by the Ninth Circuit. On the contrary, the Ninth Circuit upheld the application of Appellee's Housing Code against Appellant.

We, therefore, object to Appellant's claim that this Court has jurisdiction under section 1254(2), and pursuant to 28 U.S.C. section 2103, we treat this improvident appeal as a petition for writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. section 455(a) states: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

28 U.S.C. section 455(b)(5)(i) states:

> "(B) He shall also disqualify himself in the following circumstances:
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them or the spouse of each person:
>
> (i) Is a party to the proceeding or an officer, director, or trustee of a party."

STATEMENT OF CASE

I. Factual Background

Appellee takes issue with Appellant's Statement of the Case. The Statement fails to mention many important facts including the decisions of the lower federal courts leading up to the appeal. The Statement also is argumentative and appears to belong under the "Argument" section of the Jurisdictional Statement. Thus, Appellee respectfully submits the following statement:

Appellant owned two single, vacant homes in the City of Oakland. Appellee first began official action to abate the substandard conditions of the houses on April 16, 1975, when its Housing Advisory and Appeals Board declared both buildings substandard. No significant progress toward rehabilitation was made and on August 18, 1977, both buildings were declared public nuisance by the Appellee's Board. On August 8, 1979, Appellant

advised Appellee that he had purchased the property and would complete rehabilitation within 120 days.

On September 20, 1980, Mr. Thomas, Appellee's Supervising Housing Inspector, inspected Appellant's properties and found that Appellant was in the process of repairing one house and had obtained a building permit to repair both houses. The building permits were in effect for six months, and no evidence was shown of either renewal or reissuance of such permits. On October 2, 1980, Mr. Thomas noted substantial progress in the repair of one house, but observed that Appellant had completed only 40-50% of the work necessary to bring the building into compliance with Appellee's building code.

On July 25, 1984, the Appellee mailed letters to Appellant requesting a re-inspection. Appellant did not appear for the scheduled reinspection; thus the Appellee's staff began action to demolish

the buildings since substantial time had passed without significant work progress being shown. Further, an external inspection showed that the structures were still substandard. On October 4, 1984, Appellee's Housing Advisory and Appeals Board reaffirmed its finding that Appellant's structures were substandard and approved demolition.

In notices dated August 27, 1984 and October 26, 1984, Appellee gave Appellant 90 day notices regarding demolition of the substandard properties. Appellee then sent 60 day notices on October 26, 1984 and November 27, 1984, and 30 day notices on November 28, 1984 and January 7, 1985. Appellant then sought to appear before Appellee's Housing Advisory and Appeals Board and was placed on the agenda by Appellee's Housing Manager Julius Thomas. After consulting with Appellee's City Attorney, Mr. Thomas informed Appellant that he would be removed from the agenda.

He appeared at the Housing Advisory and Appeals Board meeting on February 7, 1985 requesting a stay of the demolition proceedings, but less than a quorum was present at the meeting, and they took no action.

On February 19, 1985, Appellant appeared before the City Council and obtained a one week stay of the demolition pending a report from the City staff on the condition of the buildings. Appellee again attempted to inspect the properties during the period of February 21 to February 26, 1985, but Appellant failed or refused to allow Appellee to inspect the properties. On February 26, 1985, the Appellee's City Council denied Appellant's request for an extension of time.

Appellee demolished Appellant's properties on March 19, 1985.

II. Litigation History

On February 4, 1985, Appellant filed his complaint for injunctive and declaratory relief and to abate or enjoin a

nuisance and for negligence, violation of civil rights and damages. He then filed a motion for temporary restraining order on February 13, 1985, which was denied by order dated March 18, 1985. On August 11, 1985, Appellee filed its Motion for Summary Judgment. Judge Vukasin's order, docketed on October 3, 1985, granted the Motion for Summary Judgment and dismissed the Doe defendants from the complaint.

Along with the motion for temporary restraining order, Appellant filed his motion for recusal requesting that District Court Judge John Vukasin recuse himself from the case. Appellant claimed that a conflict of interest arose because Judge Vukasin's brother, George Vukasin, is president of the Oakland Coliseum Board. By order dated April 24, 1985, Judge Vukasin denied Appellant's motion for recusal and refused to set aside the denial of Appellant's motion for temporary restraining order.

Appellant then appealed to the Ninth Circuit Court of Appeal challenging the dismissal of his complaint with prejudice and reasserting his claim that Judge Vukasin was required to have recused himself from the case. The Ninth Circuit affirmed the District Court's decisions by opinion dated March 10, 1987.

The Ninth Circuit found that Judge Vukasin's relation to George Vukasin did not raise a question of prejudice, because the Oakland Coliseum Board is independent from the Appellee City of Oakland and that George Vukasin's prior position on Oakland's City Council did not require recusal. Further, it held that Appellant received adequate due process and that Appellee followed proper procedure in demolishing his houses. It further found that Appellant failed to allege sufficient facts to support his Civil Rights claims. (Appellant's Appendix p. 4.)

ARGUMENT

I. Introduction

This is an attempted appeal from a decision of the Ninth Circuit (unpublished), affirming an order of the U.S. District Court for the Northern District of California which granted Appellee's Motion for Summary Judgment. The appellate jurisdiction of this Court does not extend to an action of this nature; Appellant asserts jurisdiction under section 1254(2) but fails to allege any state law held unconstitutional by the Court of Appeals. The decision below is appealable, if at all, only by a writ of certiorari under section 1254(1). Accordingly, the appeal should be dismissed and, treating the papers as an application for a writ of certiorari, the writ should be denied because of insubstantiality.

II. Appellant's Claim Of Recusal

Appellant's Motion for Recusal alleged that Judge Vukasin was required to recuse

himself because his brother, George Vukasin, serves as president of the Oakland Coliseum Board. Appellant asserted that Judge Vukasin is in violation of 28 U.S.C. section 455(a) and (b)(5)(i).

Federal Circuit Courts have applied an objective standard requiring "reasonable" grounds for recusal. See United States v. Conforte, 624 F.2d 869, 881 (9th Cir. 1980); In re United States, 666 F.2d 690, 695 (1st Cir. 1981); Hall v. Small Business Association, 695 F.2d 175, 179 (5th Cir. 1983); United States v. Norton, 700 F.2d 1072, 1076 (6th Cir. 1983) cert. denied, 461 U.S. 910 (1983); Union Carbide Corp. v. U.S. Cutting Services Inc., 782 F.2d 710, 715 (7th Cir. 1986); United States v. DeLuna, 763 F.2d 897, 907 (8th Cir. 1985).

Based on the judicial record, no objective observer could find reasonable grounds for requiring recusal of Judge Vukasin in this situation. The Oakland Coliseum Board was formed to assist the

Appellee in operating a stadium and a coliseum, but it is independent of Appellee. Appellant relied heavily on an opinion by John K. Van DeKamp, Attorney General for the State of California, concerning designation of the Board as a "legislative body." Oakland-Alameda Coliseum, Inc., 70 Ops. Cal. Atty. Gen. 57 (1987). That opinion concerned the State of California's open meeting requirements, and nothing in that opinion states that the Board is part of the Appellee. Likewise, Mr. Vukasin's position on the Board did not make him an officer, director or trustee of the City of Oakland under section 455(b). Appellant has not raised any case law holding that a relative's prior connection with a party would give rise to grounds for recusal. Mr. Vukasin's prior position on the Oakland City Council did not require Judge Vukasin to recuse himself.

Appellant further accused Judge Vukasin of being biased because of an

alleged prejudice against black people. Appellant's accusations were completely unfounded and unsupported by any facts showing past incidents of racial prejudice. An allegation of this type must be supported by a factual basis, and those facts must be judged on a reasonableness standard. In Re United States, 666 F.2d at 695. Appellant did no more than make broad, sweeping allegations which were unsupported by the record. Accordingly any charge of racial prejudice was a blind accusation which did not require recusal of Judge Vukasin.

III. Appellant's Civil Rights Claims Lack Factual Support

Appellant raises a number of civil rights claims which were not supported by any facts showing deprivation of his civil rights. 42 U.S.C. sections 1981 and 1982 relate to racial discrimination. White v. Washington Public Power Supply System, 692 F.2d 1286, 1290 (9th Cir. 1981),

Agnew v. Compton, 239 F.2d 226, 230 (9th Cir. 1957). Appellant has failed to state any facts in his Jurisdictional Statement showing any kind of racial discrimination as proscribed by these sections. Most of his allegations raise issues of notice and hearing, without claiming that the City of Oakland acted in a racially discriminatory manner.

Appellant's claims under 42 U.S.C. 1985 also were not supported by the facts. Section 1985(1) is not applicable, because Appellant did not claim any conspiracy by the City of Oakland to prevent him from holding office with the United States. Further, section 1985(2) does not apply, because Appellant did not claim any obstruction of justice. Finally, under section 1985(3), no facts were stated to support the allegation of conspiracy to deprive Appellant's civil rights. Under this section, a claimant must make specific allegations of class-based discrimination.

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The record reflects that Appellant failed to make such a showing. Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980).

Appellant's arbitrary reference to 42 U.S.C. section 2000 in his sweeping assertion of constitutional violations lacked any factual basis showing violations under its sections. Appellant did not claim any unlawful employment practice, making section 2000(e) inapplicable. No facts supported a claim under section 2000(a) because Appellant did not assert any deprivation of his equal enjoyment of public accommodations. Further, Appellant did not allege any facts under section 2000(a)(1) showing that the Appellee's Housing Code required Appellee to discriminate on the basis of race, religion or national origin. Finally, Appellant's reference to section 2000(d), regarding discrimination against individuals in denying federal financial assistance, lacked any supporting facts showing dis-

criminatory denial of funds.

IV. Appellant's Due Process Claims Are Without Merit

The legal principles which govern the power of a city to enact laws protecting the public 's health and safety have been well established by this court and the federal courts. This Court has deferred to the legislature in enacting ordinances to protect the public's safety. Queenside Hills Realty Co. v. Saxl, 328 U.S. 80 (1946). Such exercise of a city's police power will be tested against a reasonableness standard. Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

In Saxl, this Court deferred to the judgment of the legislature in the area of public safety and upheld a city law requiring installation of sprinkler systems in certain lodgehouses. This Court stated, "We are not concerned with the wisdom of the legislation or the need for it....Protection of the safety of persons is one of

EDITOR'S NOTE

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the traditional uses of the police power of the States." Saxl, 328 U.S. at 82.

Goldblatt also concerned a town ordinance enacted pursuant to the town's police power to regulate uses of property which may endanger public safety. In Goldblatt, this Court upheld a town ordinance prohibiting pit excavation below a certain water level and found that no "taking" of property would arise by enforcement of the ordinance. Although the appellant alleged that the ordinance prohibited the beneficial use of his property, this Court stated:

> "The present case must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation. A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public

> benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests....The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not -- and, consistently with the existence and safety of organized society, cannot be - burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."
>
> Goldblatt, 369 U.S. at 593, quoting Mugler v. Kansas, 123 U.S. 623, 668-669 (1887).

Appellee's Housing Code is similarly applied to protect the health and safety of the public and prevents the maintenance of housing structures in substandard condition. Enforcement of the Housing Code against substandard housing is a proper

exercise of police power. As Goldblatt states, no taking of property arises when a state enforces legislation preventing use of property for purposes that are injurious to the health, morals or safety of the public. The demolition of Appellant's property resulted from his failure to correct conditions on his property rendering it substandard, not from any "taking" by Appellee. Appellee acted within its police powers to declare Appellant's houses substandard and in ordering their demolition after Appellant failed to prove completion of required repairs.

Whether the exercise of police power is valid in a particular case is determined by the "reasonableness" of the provision. Goldblatt, infra; Lawton v. Steele, 152 U.S. 133, (1984); Trieqle v. Acme Homestead Association, 297 U.S. 189, (1935). The general statement regarding the test applied to determine the validity of a city's action is as follows: "To justify

the State...interposing its authority in behalf of the public it must appear, first, that the interests of the public...require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." Goldblatt, 369 U.S. at 594-595, quoting Lawton v. Steele, 152 U.S. 133, 137 (1894). In Goldblatt, this Court enumerated some factors useful in evaluating the reasonableness of the alleged deprivatory action, including the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer. Goldblatt, 369 U.S. at 595. This Court found that the record was insufficient and indecisive on the issue of reasonableness, and therefore upheld the ordinance due to appellant's failure to rebut the presumption of Constitutional validity.

Likewise, Appellee's demolition of Appellant's substandard properties was a reasonable exercise of police power. The public has an interest in safe and sanitary housing and in properly maintained structures in the community. Further, demolition provided a reasonable and proper means of abating substandard premises which the owner had failed or refused to repair. Here, Appellant was afforded five years time and ample opportunity to prove that he had accomplished the required repairs. He continually asserts that he completed work on his houses, but he both failed and refused to allow Appellee to enter his homes for inspection. The letter from the Housing Manager Julius Thomas noted that Appellant had made some repairs in 1980, but stated that repairs needed to continue at the same rate of progress otherwise the demolition process would no longer be held in abeyance. Appellee acted in accordance with its Housing Code in proceeding with

demolition and providing notice of demolition before proceeding. Even the week before the scheduled demolition, Appellee, by order of its City Council, stayed the planned demolition for one week to allow Appellant one more opportunity to prove he made the necessary repairs. He failed and refused to appear for that inspection, prompting Appellee to proceed with demolition.

Even considering the Goldblatt factors, the balance weighs in Appellee's favor. Appellee has a substantial interest in the health and safety of the public. As to less drastic means of accomplishing this purpose, Appellee provided in its Housing Code section H-305 that the Housing Advisory and Appeals Board would authorize demolition if the owner failed to abate the nuisance within the time required. In this case, Appellee delayed the proceedings well beyond the time required. In this case, Appellee delayed the proceedings well

beyond the time of 120 days originally granted to Appellant. Demolition was ordered only after attempts to inspect the property and determine its condition failed, and an external inspection showed its substandard and public nuisance condition.

Appellant complained of monetary losses suffered by him as a result of the demolition. In examining Appellant's alleged loss, the courts below were aware that these properties were declared substandard. Accordingly, Appellant had constructive notice of the condition of the properties from the recorded notice of substandard, and he had actual notice from his conversations with Appellee's Housing Manager Julius Thomas. The record reflects that Appellant bought the property knowing that the structures were in violation of the Housing Code. The losses he claims were measured with these factors in mind.

Any loss suffered by Appellant was

caused by his own failure to abate the public nuisance created by his structures. Further, he has not been denied the use of his property, but only the maintenance of his substandard structures.

Finally, the presumption of constitutional validity was not rebutted by Appellant's arguments. The exercise of police power is presumed to be valid, and the burden of proving that demolition was unreasonable rested with Appellant. Goldblatt, 369 U.S. at 596; Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529 (1959). Appellant made general accusations that the demolition of his property was arbitrary and resulted in a taking, but he failed to assert facts showing such denial and overcoming the presumption. He had all the process that was due and the opportunity to make repairs and allow inspections, but he failed or refused to take advantage of the opportunity.

V. Appellant's Cases Distinguished

Appellant cited a number of important decisions by this Court regarding regulatory takings of property in violation of the Due Process Clause of the Fourteenth Amendment. However, as will be discussed, these cases are distinguishable on their facts.

In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), this Court found that a taking of property arose under a city statute prohibiting the mining of coal underneath buildings or dwellings used by people if subsidence would result. This Court weighed the limited public interest involved in that case against the subsurface rights owner's almost complete loss of profitable business. Considering "extent of diminution" of property value as a factor, it found that a taking had occurred.

Recently, this Court considered a similar statute regulating coal mine

operations in Keystone Bituminous Coal Association v. DeBenedictis, 107 S.Ct. 1232 (1987). This Court found that the statute, which required coal mine operators to leave a certain amount of coal for ground support and to pay for and repair any subsidence damage, differed from the statute on Mahon. First, this Court stressed that the statute was enacted to protect the public interest in "health, the environment, and fiscal integrity of the area," and not merely to benefit private parties. DeBenedictis, 107 S.Ct. at 1242-1243. Second, this Court stated that the petitioners failed to claim that the statute made it commercially impracticable for them to continue mining coal, and that the petitioner failed to overcome the heavy burden of proving the statute resulted in a regulatory taking. Distinguishing Mahon, this Court upheld the statute against Petitioner's challenge under the takings clause.

The case at hand also involves a city law supported by a similarly important public purpose. Appellee was concerned with the danger to public safety created by substandard structures, such as fire hazards, crime and juvenile delinquency, and general unsanitary conditions. Saxl, supra; Kovacs v. Cooper, 336 U.S. 77 (1948), California Reduction Co. v. Sanitary Reduction Works of San Francisco, 199 U.S. 306 (1906). Appellee enacted its Housing Code to protect not only the residents of the structure, but also the residents in the surrounding neighborhood and fire and safety workers.

Accordingly, although demolition resulted in Appellant losing his business, it was his failure or refusal to prove he had made reasonable repairs that cost him his business. Here, Appellant was given ample time to repair his property and prevent any loss of his business. However, he refused. He has not lost his rights to

the property, or to use the property as he chooses, so long as he operates the property in a safe and sanitary condition. Like any property owner, Appellant's activities were not immune from reasonable government regulation. Saxl, 328 U.S. at 83.

The other cases Appellant cites are readily distinguishable. Dobbins v. City of Los Angeles, 195 U.S. 223 (1904), involved a city law preventing a land owner from constructing gas works on her property. A crucial finding in that case was that the city acted in an arbitrary and discriminatory manner when it initially granted her a permit to erect the work and then later prohibited the activity in that district. There is no similiar showing in this case that Appellee prohibited a previously lawful act, or any lawful act. Appellant's property was determined to be substandard from the outset and Appellant was never given permission to operate a

substandard housing structure.

Nollan v. California Coastal Commission, 107 S.Ct. 3141 (1987) involved an attempt by the state to gain an easement over a property owner's property by placing a condition on a rebuilding permit sought by owner. Appellant has not alleged any issuance of a rebuilding permit by Appellee with a condition creating an easement over Appellant's property. Nollan is not controlling in this case.

Finally, Appellant cites First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 55 U.S.L.W. 4781 (U.S. June 9, 1987) (No. 85-1199), as authority supporting his assertion that Appellee denied Appellant the right to develop his structures. That case involved a county ordinance preventing the Appellant from building any structures in the area, and this Court addressed the issue of whether compensation was required in a "temporary" regulatory taking. In this

case, Appellee's Housing Code did not involve the deprivation of any use of Appellant's land. Rather, Appellee regulated uses of the property which the City determined to be against public health and safety. No governmental taking arose here, but only the exercise of police power to remedy an unlawful use of property which persisted for many years.

CONCLUSION

Appellee respectfully prays that this Court uphold the decision of the Ninth Circuit and deny Appellant's appeal on the grounds of insubstantiality.

DATED: December 7, 1987

Respectfully submitted,

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